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No. 80-1582

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,

*Petitioner*

vs.

JEFFREY R. MACDONALD,

*Respondent*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## OPINIONS BELOW

The opinion of the court of appeals on the earlier interlocutory appeal taken by respondent is reported at 531 F.2d 196 (1976) and is reprinted *infra* (App. 1a *et*

*seq.*).* The opinions on respondent's post-conviction appeal are reprinted in petitioner's appendix (Pet. App. 1a *et seq.*).

## *COUNTER STATEMENT*

The wife and two small daughters of the respondent, Dr. Jeffrey MacDonald, who was then a captain in the Army's Medical Corps, were killed on February 17, 1970 at their home on the Fort Bragg, N.C., military reservation.** Each victim died as a result of a grisly attack involving multiple stab wounds and beatings with a club. The respondent himself suffered more than twenty wounds, including a life-threatening stab wound of the chest causing a partial lung collapse, ice-pick type punctures on his arms and stomach, and bruises to the head.

Dr. MacDonald told the police how he was awakened by the screams of his wife and one daughter, and then was attacked by several assailants and knocked unconscious. When he came to, he made a futile attempt to give medical assistance to his family and then telephoned for help. When the police and ambulance attendants arrived he was again unconscious.

Dr. MacDonald described to police the four assailants he had seen: there were three men, and a woman

* The Fourth Circuit's opinion on the interlocutory appeal is relevant for present purposes (although this Court subsequently ruled that the appeal was premature, 435 U.S. 850 (1978)), because the court below, reviewing respondent's post-conviction appeal, adopted findings made by the first panel.

We also note that we have lodged with the Clerk of this Court Volume V of the appendix to respondent's brief on appeal in the Fourth Circuit. All transcript references herein are to pages contained in that volume, and are cited as "Vol. V., p. ___."

** A brief chronology is provided as Appendix B hereto.

with long blonde hair who wore a floppy hat and shiny boots.*

An investigation of the crime was immediately begun by the Army's Criminal Investigation Division (CID), the F.B.I., and the Fayetteville (N.C.) police department. (App. 4a–5a) A team of experts from the CID laboratory examined the crime scene for a week and collected hundreds of items of physical evidence which thereafter formed the basis of the government's case in both the military and civilian criminal proceedings. The laboratory analysis of the evidence was completed within a matter of weeks.

On April 6, 1970, Dr. MacDonald was informed that he was a suspect and was restricted to quarters. On May 1, 1970, he was formally charged with the murders, placed under arrest, and confined under armed guard to his quarters. (App. 4a)

Shortly thereafter an Investigating Officer, Colonel Warren V. Rock, was appointed, pursuant to Article 32, Uniform Code of Military Justice, 10 U.S.C. 832, to examine the charges against Dr. MacDonald and to recommend whether there was any basis for a court martial.

The evidence presented by the government at the military justice proceedings was wholly circumstantial, consisting of physical artifacts found at the crime scene. Fifty-six witnesses, including respondent, were heard by the Investigating Officer. (App. 5a)

At the conclusion of the proceedings in October 1970, Colonel Rock prepared a 90-page report concluding:

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* A police officer recognized the description as resembling a woman he had seen on the street a few minutes earlier as he was racing to the MacDonald home. He was suspicious of her presence but was under orders to respond to an emergency call.

(1) that the charges against Dr. MacDonald were "not true," and (2) that there was sufficient evidence against a woman named Helena Stoeckley to require an investigation by civilian law enforcement agencies of her involvement in the murders and the assault on Dr. MacDonald. (App. 5a)

The charges against Dr. MacDonald were then dismissed by the Army. In January 1971, however, the Justice Department requested that the CID reopen the matter. From that time on, it is clear that Dr. MacDonald remained the primary suspect. The ensuing investigation by the CID was completed in December 1971, eleven months later. It had interviewed 699 witnesses and reexamined the physical evidence in crime laboratories. (App. 6a) No new physical evidence was uncovered. (App. 6a, 17a–18a) The CID then took six more months to assemble its findings and write a report, which was submitted to the Justice Department in June 1972. (App. 6a)

From June 1972 until August 1974, when a grand jury investigation was begun, there was no significant investigative activity in the case (App. 17a–18a, Pet. App. 4a–5a), although Dr. MacDonald, in person and through letters from his attorneys, urged that the Justice Department complete its investigation, and offered his full cooperation. Attorneys in the Justice Department debated whether to prosecute Dr. MacDonald, but no action was taken for two years, until 1974, when a new Justice Department attorney was assigned to the case. He began to present evidence to the grand jury (before whom respondent testified) in August 1974. (App. 6a, Pet. App. 8a)

On January 24, 1975,* an indictment was re-

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* This was less than one month before the applicable 5-year statute of limitation would have run.

turned and on January 25, 1975 respondent was again arrested. He promptly filed motions to dismiss the indictment on speedy trial and double jeopardy grounds. The district court denied those motions and the court of appeals stayed the trial pending hearing of an appeal. (App. 1a)

The court of appeals, stating that its jurisdiction over the double jeopardy issue was clear, nevertheless premised its decision reversing the district court and ordering the indictment dismissed on the speedy trial ground. In that connection it found the following facts:

Respondent had been arrested and incarcerated by the Army on May 1, 1970, the starting point for the speedy trial inquiry. Following respondent's discharge from custody six months later, there was a period of approximately 18 months of intense investigatory activity by both military and F.B.I. investigators. (App. 17a) But, from June 1972 until the government began presenting evidence to a grand jury in August 1974, there was an unexplained, unwarranted and lengthy delay during which "no significant new investigation was undertaken," *Id.*

> The leisurely pace from June 1972, until the indictment was returned in January 1975, appears to have been primarily for the government's convenience. The Assistant United States Attorney for the Eastern District of North Carolina, who is familiar with the case, expressed an even harsher assessment for the delay. He told the magistrate at the bail hearing that the tangible evidence had been known to the government since the initial investigation in 1970 but that it had not been fully analyzed by the F.B.I. until the latter part of 1974. He explained that the F.B.I. analysis was tardy "because of government bureaucracy." (App. 17a–18a)

The court of appeals further found that Dr. MacDonald fully cooperated with the government during

its investigation prior to the return of the indictment, and consistently expressed a desire that the matter be settled as promptly as possible, because of the unfounded suspicion to which he was subjected. (App. 6a–7a, 19a–20a)

In analyzing the case as it stood prior to trial, the Fourth Circuit concluded that there was substantial prejudice to respondent. While the government's case rested entirely on circumstantial evidence, the court of appeals concluded that the memory of witnesses who would testify about that physical evidence would be suspect because of the passage of time. (App. 21a–23a) This coupled with the factors of personal prejudice resulting from delay — anxiety, stress, the severe financial pressures occasioned by the continuous need to retain counsel, and the ongoing adverse publicity — satisfied the court that under the criteria enunciated in *Barker v. Wingo*, 407 U.S. 514 (1972), and *United States v. Marion*, 404 U.S. 307 (1971), the indictment should be dismissed. (App. 22a–24a)

The United States filed a petition for certiorari, challenging the court of appeals' holding that it had jurisdiction of the speedy trial issue in advance of final judgment. This Court granted the petition and reversed on jurisdictional grounds, carefully noting that it had not reached the merits of respondent's claim, 435 U.S. at 863.

Upon remand, the Fourth Circuit ruled against Dr. MacDonald's double jeopardy assertion and returned the case to the district court.

The government's case at trial in 1979 consisted solely of highly technical, circumstantial evidence. The physical evidence which was introduced had been in possession of the government since the original CID investigation in 1970. Neither at the Article 32 Investigation, nor at trial, did the government purport to show any motive for the respondent to have committed the crimes.

The defense called Helena Stoeckley to the stand

but she claimed that she had no recollection of her activities during the critical hours when the crimes occurred (the early morning hours of February 17, 1970), although she recalled her whereabouts shortly before and shortly after. She also said that she did not recall having made any statements placing herself at the scene. Respondent then attempted to introduce the testimony of seven witnesses to whom Helena Stoeckley had made admissions implicating herself as the woman with the floppy hat, long blonde hair and boots described to the police by Dr. MacDonald. At the prosecution's urging, the district court excluded the evidence on the ground that Stoeckley was not a reliable person.

Respondent was convicted and sentenced to three consecutive terms of life imprisonment. The court of appeals (a different panel from that which heard the earlier case) reversed the conviction and ordered the indictment dismissed, on the ground that Dr. MacDonald's speedy trial rights had been violated.*

The court below noted that respondent had "vigorously pursued his right to a speedy disposition of the charges against him." (Pet. App. 8a) It found further that the length of delay between the dismissal of the Army's charges and the return of the indictment was excessive and was due entirely to "unwarranted bureaucratic delay" (Pet. App. 5a), resulting from:

> . . . either a disagreement between two groups in the Justice Department as to whether the case should be prosecuted, or just simple government

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* The court accordingly found it unnecessary to rule definitively on various claims of trial error. It did, however, indicate its disagreement with the rulings excluding testimony concerning Stoeckley's admissions against penal interest. *See* Pet. App. 13a.

> bureaucracy (the contention of the involved Assistant U. S. Attorney). (Pet App. 8a)

"[T]he government's calloused and lackadaisical attitude . . . was solely responsible for at least the last two years of delay," (Pet. App. 16a) which was characterized as "irresponsible administration of justice." *Id.*

As in the 1976 opinion (App. A), the court below emphasized that the delay in bringing respondent to trial resulted in serious "personal prejudice to the accused." (Pet. App. 16a) "Not only was he under a cloud of suspicion for five years prior to trial, but the personal pressure and anxiety of a threatened prosecution for murder is demonstrated by the expense and concern he expended in attempting to have the charges resolved." *Id.*

The court further found that the defense suffered substantial prejudice because of its inability to bring to the jury the information that Stoeckley might have provided in the absence of long delay:*

> The likelihood that Stoeckley would testify that she could not remember was inevitably increased by the passage of the period of inexcusable delay. The consequences of having put on a witness who was to have verified MacDonald's own version of a Manson-like intrusion, only to have her fail to do so, may well have been disastrous to the defense .... Had Stoeckley testified as it was reasonable to expect she might have testified, the injury to the government's case would have been incalculably great .... The government's inexcusable delay of over two years' duration cannot be eliminated as a potential — in-

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* In addition, the lower court observed other trial prejudices; for example, the inability to cross examine witnesses whose memory, nine years after the events, may have been altered by prosecutors' preparation, and, in general, "memory erosion." (Pet. App. 10a–11a)

deed a probable — cause of that memory lapse. (Pet. App. 11a–12a)

The Government's motion for reconsideration *en banc* was denied by a divided court. (Pet. App. 29a)

## ARGUMENT

1. The Government asserts that the instant case presents a legal issue of general importance which this Court should review because the court of appeals included "in its speedy trial calculations the period from October 1970, to January 1975, during which time respondent was not under arrest, indictment or any other legal restraint . . . ." (Pet. 12)

A more appropriate formulation of the issue would be to incorporate the following findings of the court below, all of which were predicates of its determination that in the particular circumstances of this case the Sixth Amendment's guarantee of speedy trial was violated: That on May 1, 1970, following investigation by the Army Criminal Investigation Division, the Federal Bureau of Investigation and state authorities, respondent was formally charged by the military arm of the United States with the crime for which he was ultimately tried in 1979; that from May until the end of October 1970, he was "under actual restraints" and "holding to answer a criminal charge" (Pet. App. 4a); that, after an exhaustive hearing at which fifty-six witnesses testified, the military authorities determined that the charges were "not true" and should be dismissed; that nonetheless, at the instance of the Department of Justice, unremitting investigations by that Department and the CID continued between 1970 and June 1972; that, although the "Justice Department was in possession of all the evidence from June 1972," "nothing occurred until presentation to a grand jury began in August, 1974" (Pet. App. 5a); that this delay, for

which the Department was "solely responsible" (Pet. App. 16a), was "excessive," "undue," "inexcusable," and "unwarranted" (Pet. App. 5a, 10a, 18a); that the dropping of charges by the military did not dispel the effects of the government's initial accusation (App. 13a–14a); that Dr. MacDonald was subjected to "extremely intrusive publicity" (Pet. App. 6a), remained under a "cloud of suspicion" (Pet. App. 16a) and was obliged in prudence "to retain attorneys at his own expense for his continuing defense" (App. 14a); that at all times Dr. MacDonald and his attorneys fully cooperated with the authorities and "vigorously pursued his right to a speedy disposition of the charges against him" (Pet. App. 8a); and that, "viewed in the light of all the evidence developed at trial," the government's inexcusable delay resulted in prejudice to the defense (Pet. App. 14a, 18a).

It is against this background that one must appraise the Government's claim that the court below misconstrued this Court's decisions in *United States v. Marion*, 404 U.S. 307 (1971) and *Dillingham v. United States*, 423 U.S. 64 (1975).

In *Marion, supra*, the appellees asserted a Sixth Amendment claim on the ground that there was a three-year delay between the time that the Government obtained the information upon which an indictment might have been sought and the time it proceeded to do so. The Court rejected the claim, declining "to extend the reach of the amendment prior to arrest. Until this event occurs, a citizen suffers no restraint on his liberty and is not the subject of public accusation . . .," 404 U.S. at 321. Contrasting the case in which there has been an arrest prior to the filing of a formal charge, the Court stated, 404 U.S. at 320:

> Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment,

drain his financial resources, curtail his associations, subject him to public obloquy and create anxiety in him, his family and his friends.

There is no dispute that Dr. MacDonald was arrested, that he was under restraint for some six months and that the notoriety was extreme. The Government nevertheless approaches the case as if the arrest, the military charges and the confinement had never taken place, asserting that Dr. MacDonald was under no *formal* charges during the long period of delay that occurred subsequent to his initial release and prior to the return of the indictment on which he was tried. The short answer, two panels of the court of appeals found, is that the effect of the initial accusation was not dispelled. That is plainly so. The Government, by its own account, conducted 699 interviews between January and December 1971. (App. 6a) National newspaper publicity was unceasing. Dr. MacDonald "remained under suspicion and was subjected to the anxiety of the threat of another prosecution." (App. 14a) In these circumstances, the court below properly concluded, the Government was under an obligation to bring the matter to a final resolution without excessive delay. Instead, it let the case lie on the shelf for upward of two years after its second exhaustive round of investigation was completed and all the evidence was in.*

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* *Dillingham v. United States*, 423 U.S. 64 (1975), reaffirmed the view, previously stated in *Marion*, that an arrest activates the Sixth Amendment's provision for speedy trial. This Court, *per curiam*, reversed the court of appeals for its failure, in considering a speedy trial claim, to count an interval of twenty-two months that elapsed between the petitioner's arrest and indictment. *See also, Klopfer v. North Carolina*, 386 U.S. 213 (1967), in which a state prosecutor moved to take a "nolle prosequi with leave," a procedure that discharged the accused but left open the possibility of a revived prosecution. Because the threat of prosecution had not been laid to rest and the State had offered no justification for an indefinite postponement of final resolution, this Court ruled that the right of speedy trial had been violated. As Judge Butzner observed for the court of appeals in 1976, Dr. MacDonald's "situation, viewed realistically, was similar to Klopfer's." (App. 16a)

Viewed against its factual background, the decision below implements, rather than departs from, the teaching of *Marion, supra*. If an arrest is a public act that activates the speedy trial guarantee because it may cause public obloquy, drain financial resources, impair associations and cause continuing anxiety over the threat of prosecution, then surely it is appropriate to rule, in a case in which those consequences are experienced in extreme form and are unremitting, that the Government must at least proceed with reasonable promptness after its investigations are completed, lest it damage unnecessarily the very interests the Constitutional provision is designed to protect. Judge Murnaghan, the author of the opinion below, has emphasized the circumscribed character of the court's ruling (Statement on Request for Rehearing, Pet. App. 48a–49a):

> . . . I should not pass, in complete silence, the dissent's principal plaint: its contention that time between dismissal of an indictment (or its equivalent) and the processing of a subsequent indictment should not count for purposes of determining whether a speedy trial has been denied. Few, if any, absolutes exist in our judicial system. Each case presents its peculiar difficulties. . . . Here the situation was such that, from October 1970 . . . until indictment in 1975, MacDonald's possible involvement was not dormant. The immense publicity and the continued inquietude because the matter was not put to rest engaged the tenets of the Sixth Amendment.

2. The Government's claim of a conflict among the circuits is likewise unpersuasive. While one can find language indicating that a delay between dismissal of a charge and its reinstitution may be ignored for Sixth Amendment purposes, each of the cases cited by the Gov-

ernment is entirely consistent with the result reached below. In each, it appears that there was either no claim of specific prejudice to the defendant or that the claim, if made, was found to be without adequate support.

We turn to the two cases upon which the Government principally relies (Pet. 15). In *United States v. Martin*, 543 F.2d 577 (6th Cir. 1976), *cert. denied*, 429 U.S. 1050 (1977), involving dismissal of an indictment on charges of counterfeiting and a subsequent reindictment for the same offense, it appears that there was no showing of prejudice. The court was further of the view that the period was "insufficient" to make out a Sixth Amendment violation. To be sure, the court also stated that because there was "no indictment which could have been tried" during the intervening period, "we cannot say that a speedy trial was delayed during that time," *id.*, at 579. This proposition, however, is plainly untenable. This Court has unequivocally recognized in both *Marion* and *Dillingham* that the Sixth Amendement is implicated by delay between an arrest and an indictment; that is likewise a period during which "no indictment could have been tried." More importantly, *Martin* was overruled *sub silentio* by the Sixth Circuit in *United States v. Roberts*, 548 F.2d 665 (6th Cir. 1977), *cert. denied*, 431 U.S. 920, 431 U.S. 931, 433 U.S. 913 (1977).

In *United States v. Bishton*, 463 F.2d 887 (D.C. Cir. 1972), the appellant was initially charged with a bribery offense under the District of Columbia Code. The trial court dismissed on the ground that there was a defect in the information, and the Government appealed. The District of Columbia Court of Appeals affirmed the dismissal and the Government obtained a federal indictment under the United States Code, three months later. Considering the appeal taken following conviction in the federal court, the court of appeals stated, 463 F.2d at 890, "We do not intimate that the delay caused by appeals by

the Government may never constitute denial of a defendant's right to speedy trial." It proceeded to find, however, that the prosecutor had acted reasonably in initially charging under the District of Columbia Code; that his appeal was taken in good faith, the defect in the information being "highly technical," *id.* at 891, and that examination of the trial record failed to show that the defendant had been prejudiced by the fact that the Government initially took the wrong route, *id.* The court concluded, 463 F.2d at 891—892, "If this were a case where the delays could not be explained or justified by the Government, or where the defendant's ability to present a defense was demonstrably affected, or where the Government's case on the merits was close, then the balance between the interest of the public and the protection of the individual might be different."

The Government's petition suggests (Pet. 15) that the *Bishton* court did not consider the interval between the first and second prosecutions "for speedy trial purposes" but only in relation to the Fifth Amendment's guarantee of due process. The fact is that the opinion, at various points, looks to both Fifth and Sixth Amendment criteria. In all events, it is undeniable that the result is fully consistent with the instant case in which the delay was held unjustified and serious prejudice found.

Finally, we point out that the District of Columbia Circuit, in a subsequent case not cited by the Government but presenting the same issue of delay between prosecutions, squarely relied upon the applicability of the Sixth Amendment. In *United States v. Lara*, 520 F.2d 460 (D.C. Cir. 1975), the defendants were initially indicted in October 1972. A superseding indictment was returned in January 1973. In February and March 1973 these indictments were dismissed. The defendants were not reindicted until December 1973, after a nine-month period during which no formal charges were pending against

them. The court of appeals considered the *entire* period from the first indictment to the trial and concluded that the defendants' Sixth Amendment rights had been denied.*

3. The government, proceeding from its premise that the Sixth Amendment is inapplicable to the delay it caused, asserts that the prejudice to Dr. MacDonald is insufficient to establish fundamental unfairness under the Fifth Amendment. The court below did not reach that

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* The remaining cases cited by the Government (Pet. 16) may be addressed summarily. Although there is language in *United States v. Hillegas*, 578 F.2d 453 (2d Cir. 1978) favorable to the Government's position, the critical fact is that the court found the defendant's claim of prejudice "plainly insubstantial," 578 F.2d 460-461 at n. 10. Moreover, it did recognize that at least in some circumstances "substantial arrest-related disabilities may persist even after the dismissal of a criminal complaint," 578 F.2d at 458, n. 3.

*Arnold v. McCarthy*, 566 F.2d 1377 (9th Cir. 1978) examined a period of delay between a declaration of mistrial and subsequent retrial under a due process rather than a Sixth Amendment standard. Subsequently, the Ninth Circuit stated in *United States v. Henry*, 615 F.2d 1223 (9th Cir. 1980) that *Arnold* was "inapposite" when there is a delay between dismissal of a charge and reindictment, because in the mistrial situation there is not "the same opportunity for abuse by the government," 615 F.2d 1233 at n. 13. *Arnold* has thus been limited to its facts. In Henry's case the decision denying relief was rested on his concession that he had not been prejudiced by the delay in reindictment.

*United States v. Stoker*, 522 F.2d 576 (10th Cir. 1975) dismisses the matter of delay between dismissal of the first indictment and return of a second indictment with the cryptic comment that it was the defendant who apparently procured the dismissal. In all events, that circuit's more recent decision in *United States v. Huffman*, 595 F.2d 551 (10th Cir. 1979), adopts the view that where an original charge is dropped and succeeded by a second indictment charging the same offense, the appropriate analysis requires measuring the delay from the original arrest or charge and judging it by the *Barker v. Wingo* standard. *See* 595 F.2d. at 557, n. 3, citing *United States v. Merrick*, 464 F.2d 1087 (10th Cir. 1972), *cert. denied*, 409 U.S. 1023 (1972).

issue, having concluded — correctly, as we believe — that a violation of the speedy trial provision had been shown. We address the matter of prejudice to demonstrate, *first*, that the court below was clearly correct in holding that the Sixth Amendment standard was met (a point not seriously disputed in the petition), and, *second*, that the record would likewise fully support a determination that the trial was rendered fundamentally unfair by the delay. We particularly emphasize that the defense lost the benefit of the testimony of Helena Stoeckley, a woman who answered Dr. MacDonald's description of the female intruder and who has repeatedly admitted, outside the courtroom, that she was one of four persons who invaded the MacDonald household and committed the crimes charged to him.*

First, however, we note briefly the court's findings as to other aspects of prejudice. As already observed, it found that Dr. MacDonald suffered serious prejudice prior to trial — public obloquy, extended anxiety and stress, continuing drain upon financial resources. With respect to the trial itself, it found that there are peculiar hazards for a defendant in dealing with a hypothetical reconstruction of a crime and in combatting "an array of technical evidence. The technical witnesses frequently are relying on scientific speculation and trial and error." (Pet. App. 16a at n. 7) The difficulty of examining the basis of their claims and observations is aggravated when memories have faded and the witnesses rely on statements or writings made years before. "The risk to MacDonald," the

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* As we also point out *infra*, it was at the Government's insistence that the trial court, compounding the injury, indefensibly excluded testimony concerning Stoeckley's admissions against penal interest.

court stated (Pet. App. 10a), "was simply too great that, in preparations *prior to the testifying* of each witness, the prosecutors helped fill lacunae of recollection, and assured consistency of support for their theory of the case . . . " *Id.* (italics in original) The length of the intervening period "rendered it virtually impossible for MacDonald to probe the recollections of each witness . . . " *Id.*

Helena Stoeckley should have been the vital witness for the defense. MacDonald's description of the female intruder was sufficient to suggest to a local officer (Beasley) that Stoeckley, whom Beasley had used as an informant in drug cases and found reliable*, might be the woman. Questioned by Beasley the day after the crime, Stoeckley implicated herself. Some days thereafter, she volunteered to a neighbor, one Posey, that she had been seen by policemen at an intersection near the MacDonald house shortly after the murders. She said further that all she had done was to hold the light during the murders and that she herself did not kill anybody. She made additional inculpatory admissions to five other persons (one, a CID investigator, another, a Nashville police officer, the others, friends or acquaintances) in 1970, 1971, 1972 and 1979. The admissions were fragmentary — she would say something about her involvement, then, apparently believing that she had said too much, withdraw — but they were damning.**

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* Detective Beasley testified she was "the most reliable informant I ever had." (Vol. V, p. 1221) Another police officer, when asked if he believed her inculpatory statements to him testified, "I would have investigated further, and I would have indicted her . . ." (Vol. V, p. 1195)

** Among her admissions were the following, as recounted by her auditors on *voir dire* before the district judge:

The jury, however, heard nothing from Stoeckley

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"I can't ever go home [to Fayetteville] again . . . [b]ecause I was involved in some murders." (Vol. V, p. 1178)

"[Stoeckley] knew about the blood on the bed." (Vol. V, p. 1215)

"So much blood. So much blood. I couldn't see or think of anything but so much blood." (Vol. V, p. 1182)

"She said that there was a kid's horse thing, [in one of MacDonald's children's room] but it wouldn't — it wouldn't roll. It would just stay still. It wouldn't roll, you know . . . it was broke or something, it wouldn't move." (Vol. V, p. 1241)

"It's a memory. I remember standing at the couch, holding a candle, only — you know — it wasn't dripping wax. It was dripping blood." (Vol. V, p. 1265)

"In my mind it seems that I saw the thing [the murders] happen. I was heavy on mescaline." (Vol. V, p. 1223) [Police Officer was asked whether Stoeckley admitted being present at the assaults on the MacDonald family.] "That is correct, but [she] had not been involved in the actual killings themselves." (Vol. V, p. 1193–1194)

"I talked with [Stoeckley] on several occasions about the murders. She said she thought she had been there when the murders took place." (Vol. V, p. 1189)

"[Stoeckley] said that all she did, you know, was like hold the light; you know, that she didn't — she wouldn't kill anybody because she wasn't a hostile person, you know." (Vol. V, p. 1240)

[Speaking of the night of the murders,] "When I came to myself, I was in the rain. It was raining. I was terrified." (Vol. V, p. 1179)

"[Stoeckley said] It had been drizzling rain during the night but that it did not start to rain hard until after the homicides." [When asked a question by the investigator she refused to say more and explained:] "I've already said too much." (Vol. V, p. 1208–1209)

[Stoeckley said that on the night of the murders] "it was raining heavily; and she was afraid her wig would be ruined, and she was worried about the wet wig." (Vol. V, p. 1183)

"[Stoeckley discussed the clothing she wore on the night of the murders] . . . she had on her blonde wig and her white boots [and she said] 'I loved them but I had to get rid of them'." (Vol. V, p. 1183)

concerning events at the MacDonald house. Called to the stand by the defense, she said that she did not recall her whereabouts or activities during the critical hours (midnight to 4:30 a.m.) though she remembered what occurred before and after. The court below observed that the failure of Stoeckley to verify "MacDonald's own version of a Manson-like intrusion . . . may well have been disastrous to the defense." (Pet. App. 11a–12a) "Had Stoeckley testified as it was reasonable to expect she might have testified, the injury to the government's case would have been incalculably great." (Pet. App. 12a) The opinion continues *(id.)*:

> The possible reasons why Stoeckley did not testify are several. But the reason she asserted under oath was failure of memory. The government's inexcusable delay of over two years' duration cannot be eliminated as a potential — indeed a probable — cause of that memory lapse.

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[After Stoeckley was told that she had been seen by a military policeman near the crime scene that night, she responded by correctly naming the street] "you know, — Honeycutt." (Vol. V, p. 1240)

"After the night of the MacDonald incident . . . she was in a joyful mood and joked about her ice pick.' [One of the four murder weapons was identified as likely to have been an ice pick.] (Vol. V, p. 1231)

[Stoeckley talking about the men she was with on the night of the MacDonald murders] "They killed her and the two children." (Vol. V, p. 1197)

"[Stoeckley said] she went into hiding to evade police arrest." (Vol. V, p. 1206)

[Stoeckley was questioned by a CID agent concerning her willingness to testify about the crime. She said] "That if the Army would give her immunity from prosecution, she would furnish the identity of those offenders who committed the murders and explain the circumstances surrounding the homicides." (Vol. V, p. 1207)

It would be no answer, moreover, that the loss of memory may have been feigned. If matters had been brought to a prompt resolution, it cannot be presumed that Stoeckley would have had the temerity to engage in such a pretense.

The damage resulting from Stoeckley's asserted loss of memory might well have been allayed or cured by the introduction of her repeated out-of-court admissions against interest. Instead, it was compounded by indefensible error. When the defense offered the testimony of seven witnesses to whom Stoeckley had made inculpatory statements, the prosecution vigorously objected that Stoeckley was unreliable and that therefore the testimony of the seven should be excluded.* The objection was sustained but the testimony of the proffered witnesses

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* The issue under Federal Rule of Evidence 804(b)(3), is not whether the person who made the out-of-court declarations against penal interest is a reliable person; the question is whether the declarations are credible. Here, the statements contained internal earmarks of reliability and there were strong corroborating circumstances, not least of them Dr. MacDonald's description of the woman intruder. Commenting on the Rule, Judge Weinstein has stated (4 *Weinstein's Evidence* 804-104, 804-105):

> The court should only ask for sufficient corroboration to "clearly" permit a reasonable man to believe that the statement might have been made in good faith and that it could be true. If, for example, the proof is undisputed that the person confessing to a shooting could not have been at the scene of the crime because he was in prison, it will be excluded. But if there is evidence that he was near the scene and had some motive or background connecting him with the crime that should suffice.

*See also*, Judge Murnaghan's comments below, Pet. App. 13a. Indeed, if the Rule were not construed to permit the introduction of admissions against penal interest in the instant circumstances, it would violate this Court's constitutional ruling in *Chambers v. Mississippi*, 410 U.S. 284 (1973).

was preserved for appellate review at a *voir dire* hearing requested by the defense.

In sum, the defense was deprived of the opportunity of introducing Stoeckley's account directly (traceable, in the court's words (Pet. App. 16a), to the Justice Department's "calloused and lackadaisical attitude" in proceeding with the case) and deprived also of the opportunity of offering it indirectly through Stoeckley's out-of-court declarations (this traceable to the prosecutor's misguided efforts to keep from the jury the words of the one identified living person, other than Dr. MacDonald, who admitted to having been on the scene).* The result, we submit, was fundamentally unfair.

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* In view of the publicity the matter has received, we make note of the fact (not a part of the record) that Helena Stoeckley, in December 1980, granted an extended interview to a reporter for the Fayetteville [North Carolina] Times, recounting her knowledge of the MacDonald murders. The story was widely disseminated by the Associated Press (*see* copy reprinted as Appendix C) and reports, *inter alia*, that Stoeckley has now named the other persons involved in the attack. The story also makes reference to the fact that Stoeckley had previously been interviewed by "Ted Gunderson, a Los Angeles private detective."

Gunderson, a retired chief of the Los Angeles office of the F.B.I., was retained by friends of Dr. MacDonald, following MacDonald's conviction in August 1979, to see if he could develop additional evidence. Gunderson succeeded in locating Stoeckley who, after initially refusing to talk to him, agreed to be interviewed. Several lengthy interviews took place between October and December of 1980. Counsel for Dr. MacDonald have made copies of these interviews and of Gunderson's report available to the Department of Justice. Stoeckley's decision to speak to the press was her own.

## CONCLUSION

The decision below, finding a violation of the Sixth Admendment's guarantee of speedy trial, rests on the particular circumstances of this case and presents no question of general importance warranting this Court's review. The record is one which would also support, were there any occasion to go further, a finding of violation of Fifth Amendment standards.

In few criminal cases has a defendant remained under prosecution or active threat of prosecution for a period extending in excess of eleven years. There is compelling reason to believe that, but for the prosecution's delay and its successful opposition to the defense's effort to bring vital admissible testimony to the attention of the jury, there would have been no conviction and no occasion for appellate review. The cause has now been reviewed at length in the court of appeals. It should not be further protracted.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

RALPH S. SPRITZER
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May 1981

## Appendix A

[196] UNITED STATES of America, Appellee,

v.

Jeffrey R. MacDONALD, Appellant.

Nos. 75-1870, 75-1871.

United States Court of Appeals,
Fourth Circuit.

Argued Oct. 8, 1975.
Decided Jan. 23, 1976.

• • •

[198] Before CRAVEN, BUTZNER and RUSSELL, Circuit Judges.

BUTZNER, Circuit Judge:

Jeffrey Robert MacDonald appeals from the denial of several motions relating to his prosecution for the 1970 deaths of his wife and two daughters.[1] We conclude that the [199] delay of four and one-half years, dating from the Army's accusation and detention of MacDonald in May 1970 to his indictment in January 1975, even when allowances are made for several intervals, violates the right to a speedy trial guaranteed by the sixth amendment.[2] We therefore reverse and order dismissal with prejudice.

I

We stayed MacDonald's trial and allowed this interlocutory appeal pursuant to our decision in *United States v.*

1. The district court has jurisdiction because the crimes were committed on a military base. 18 U.S.C. §§ 7(3), 1111, and 3231.

2. "In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial . . .." U.S. Const. amend. VI.

*Lansdown*, 460 F.2d 164, 170-71 (4th Cir. 1972).[3] There, we held that 28 U.S.C. § 1291 did not bar an interlocutory appeal in criminal cases where important rights, collateral to the main action, would be irreparably lost unless considered before trial. *But see United States v. Bailey*, 512 F.2d 833 (5th Cir. 1975). In *Lansdown* the appeal was from an order rejecting a plea of double jeopardy. We held that post-trial consideration of the issue could provide only inadequate relief because the double jeopardy prohibition was intended to prevent the hardship of undergoing a second trial. *See Green v. United States*, 355 U.S. 184, 187, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). The denial of MacDonald's plea of double jeopardy, like Lansdown's, is a proper subject for interlocutory review, but for reasons discussed in Part IV, we believe it preferable not to decide this issue. Instead, we have rested our decision on the sixth amendment's provision for a speedy trial.

Pendent to the double jeopardy claim, and closely related to it, is MacDonald's affirmative defense of denial of a speedy trial. This sixth amendment claim is also collateral and can be decided without considering the merits of the charges against MacDonald. The guarantee of a speedy trial is a fundamental constitutional right. *Braden v.*

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3. In our order of August 15, 1975, allowing MacDonald's petition for an interlocutory appeal, we noted his contentions that he had been denied his rights against double jeopardy and to a speedy trial. We then concluded ". . . that the contentions made are not frivolous and that the rights asserted are too important to be denied review, and if review is postponed until after the trial of the case, claimed rights will have been irreparably lost. *United States v. Lansdown* . . ."

We also allowed MacDonald to appeal issues that would otherwise be subject to the final judgment rule, saying: "In view of our accepting the appeal of [the orders overruling the double jeopardy and speedy trial defenses], we will also consider the other questions sought to be appealed, which, if not now presented, might occasion further delay in terminating this litigation." *See* part IV *infra*.

*Judicial Circuit Court,* 410 U.S. 484, 489-90, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973); *Klopfer v. North Carolina,* 386 U.S. 213, 223-25, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967); *Kane v. Virginia,* 419 F.2d 1369, 1371-73 (4th Cir. 1970). Not every speedy trial claim, however, merits an interlocutory appeal. Generally, this defense should be reviewed after final judgment. It is the extraordinary nature of MacDonald's case that persuaded us to allow an interlocutory appeal.

The hearing conducted by the Army in 1970 lasted for more than a month, and the government estimates that the trial would take six to eight weeks. The prosecution's case is wholly circumstantial and rests on a detailed, hypothetical reconstruction of the crime. Witnesses, who have scattered across the country in the last five years, must be interviewed and assembled at great expense to both the government and the defense.

MacDonald's collateral defenses of double jeopardy and denial of a speedy trial are not fanciful. Never before, as we mention in Part IV, has a soldier been prosecuted by civilian authorities after being exonerated by his commanding officer following an Article 32 hearing; and a delay of five years between the initiation of prosecution and trial is extraordinary. Had we denied the interlocutory appeal and subsequently sustained either of MacDonald's collateral defenses, all of the burdens on the [200] court and the parties of a prolonged, expensive trial would be for naught. These factors, which we regard as unique, were the basis for allowing this appeal.

II

In the early morning of February 17, 1970, military police received a call for help from Captain MacDonald, a physician stationed at Fort Bragg, North Carolina. Upon arriving at the family's quarters, the police found Mrs.

MacDonald and the couple's two daughters clubbed and stabbed to death. MacDonald told the police that screams of his wife and six-year-old daughter awoke him from the couch in the living room. He said that during a short struggle four assailants stabbed him and knocked him unconscious. Upon regaining his senses, he attempted to revive his family and telephoned for help.

The military police, the Army's Criminal Investigation Division (CID), the F.B.I., and the Fayetteville, North Carolina, police department immediately began an investigation of the crime. Examination disclosed that each member of the MacDonald family had a different blood type. The location of the victims' blood in the apartment and the presence of one daughter's blood on MacDonald's glasses cast doubt on MacDonald's account. Similarly, the presence of stray fibers from his pajama top in the master bedroom did not correspond with MacDonald's statement that it was ripped in a struggle in the living room. Torn and bloody pieces of surgical gloves, apparently of a type kept by MacDonald, were found near the victims. Although there were numerous unidentified fingerprints in the apartment, no direct evidence of the alleged intruders was found. From these and other circumstances, investigators theorized that MacDonald had killed his family and staged the murder scene to cover up his crime.

On April 6, 1970, the CID questioned MacDonald and informed him that he was under suspicion. That same day he was relieved of his medical duties and restricted to quarters by his commanding officer. On May 1, 1970, the Army formally charged him with the murders.

Major General Edward M. Flanagan, Jr., Commanding General of the unit to which MacDonald was assigned, ap-

pointed Colonel Warren V. Rock to investigate the charges, with the assistance of a legal officer, in accordance with Article 32 of the Uniform Code of Military Justice. Colonel Rock's final report described the manner in which the Article 32 proceedings were conducted:

> "In view of the fact that both government and defense were represented by counsel, the hearing was conducted in generally the same format as a trial. Government presented its evidence and rested, defense did likewise and finally the Article 32 Officer called for witnesses and evidence. In all instances opposing counsel was given the full right of cross examination. It was necessary to give considerable latitude to counsel and permit the introduction of some hearsay-type evidence for both sides. The legal advisor sat next to the Investigating Officer throughout the hearing and his sole function was to assist him in making proper legal rulings on all questions that arose."

The government called 27 witnesses and MacDonald 29, including many character witnesses. He himself testified and was subjected to extensive cross-examination.

At the conclusion of the Article 32 proceedings, Colonel Rock filed an exhaustive report in which he recommended that "[a]ll charges and specifications against Captain Jeffrey R. MacDonald be dismissed because the matters set forth in all charges and specifications are not true. . . ." He also recommended that the civilian authorities investigate a named suspect. On review of Colonel Rock's report, General Flanagan dismissed the charges on October 23, 1970, and reported this to the Commanding General of Fort Bragg, who took no further action. Shortly afterward, the Army released MacDonald from quarters and, underscoring the finality of the military proceed- [201] ings, it granted him

an honorable discharge for reasons of hardship in December 1970.[4]

Following MacDonald's discharge, the Department of Justice asked the CID to continue its investigation. The CID complied, conducting 699 interviews. At the request of the department, it sent the weapons and the victims' clothing to the F.B.I. laboratory in July 1971 and in August furnished the Treasury Department's laboratory other items for analysis. The CID completed its field investigation in December 1971, and in June 1972 it transmitted to the Justice Department a 13-volume report recommending prosecution. A number of government attorneys studied the report and asked for further investigations. The CID filed two supplemental reports, but upon receiving a request for additional investigation, it suggested convening a grand jury before it expended any more effort. Finally, in August 1974 the government started presenting the case to a grand jury. Concurrently, the F.B.I. examined several items from the MacDonald house, and it exhumed the bodies of Mrs. MacDonald and the children to obtain hair samples.

Shortly after his discharge, MacDonald moved to California where he resumed the practice of medicine. In 1971 he was again interviewed by the CID. Beginning in January 1972 and continuing through January 1974, MacDonald, first in person and then through letters by his attorneys, requested the government to complete its investigation. He repeatedly offered to submit to an interview by the government attorneys in charge of the case.[5] The attorneys, how-

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4. MacDonald's discharge barred any further military proceedings against him. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8 (1955).

5. For example, on March 27, 1973, MacDonald's attorney wrote an attorney in the criminal division of the Department of Justice:

> "I am taking the liberty to again urge upon you and the Justice Department to accept our offer to submit Dr. Mac-

ever, declined to question him and to advise when their investigation would be completed. The correspondence appears to have come to an end in January 1974, leaving MacDonald in suspense.[6] MacDonald was subsequently subpoenaed to appear before the grand jury. He waived his right to remain silent and testified on two occasions for a total of more than five days.

The grand jury indicted MacDonald on January 24, 1975. He was promptly arrested in California and a week later admitted to bail. He moved to have the indictment dismissed, contending that the government's delay in obtaining it

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Donald to an in depth on-the-record interview by your office. "It seems to me that there are mutual advantages to our suggestion. From the standpoint of your office it would present the opportunity to perhaps obtain answers to some of the questions that may have arisen in your minds as a result of the study of the record and investigative reports in this case. From our standpoint we believe that an interview with Dr. MacDonald can only confirm the correctness of the finding of the Army's own initial hearing officer, Colonel Rock."

6. On January 8, 1974, MacDonald's counsel wrote:
"It is with some reservations that I write this letter to you to inquire about the status of your Department's review of the investigation of the deaths of the MacDonald family at Ft. Bragg, North Carolina. However, in fairness to my client who has lived with the twin tragedies of those deaths and the unfounded suspicion of himself in connection with them, that I ask whether a final decision has been made in connection with any Federal criminal action against him. If such a decision has not yet been made may I inquire as to when we may reasonably expect it to be made.

"I again renew to you our previously stated offer to submit Dr. MacDonald to full questioning by attorneys of the Department of Justice."

The chief of the General Crimes Section replied on January 23, 1974:

"For your information, this case is under active investigation and will remain under consideration for the foreseeable future. "I do not believe it would serve any useful purpose at this time to accede to your request that Jeffrey MacDonald be questioned by attorneys from the Department of Justice."

denied him the right to a speedy trial. The district court denied the motion, holding that MacDonald's right to a speedy trial did not arise [202] until the government accused him of the crime by the return of the indictment in January 1975.[7]

III

To determine whether a person charged with crime has been denied a speedy trial in violation of the sixth amendment, it is necessary to weigh the conduct of both the prosecution and the defendant. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Recognizing that this balance compels an ad hoc appraisal of each case, *Barker* identified four factors that must be considered. They are "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 U.S. at 530, 92 S.Ct. at 2192. We will assess each separately.

*Length of delay.* The critical issue concerning this aspect of the case is the identification of the event, and consequently the date, marking the beginning of the delay. The district court accepted the government's position that MacDonald's

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7. In its order denying MacDonald's motion, the district court said:

> "By this motion [to dismiss the indictment for denial of the right to speedy prosecution and trial] the defendant takes the government to task for pre-indictment delay amounting to almost five years between the date of the crime on February 17, 1970, and the return of the indictment by the grand jury on January 25, 1975. The government has undertaken to justify the delay on the grounds that 'because of government bureaucracy' the facilities of the crime laboratory of the Federal Bureau of Investigation were not brought into the case until the grand jury was finally convened in August of 1974. The right to a speedy trial under the Sixth Amendment does not arise until a person has been 'accused' of a crime, and in this case this did not occur until the indictment had been returned. On the authority of *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), the motion of defendant is denied."

right to a speedy trial arose only after he was indicted in January 1975. MacDonald acknowledges that no significant delay has occurred since then. He contends, however, that the delay commenced when the Army formally charged him with murder on May 1, 1970, and restricted him to quarters. The length of delay, therefore, depends entirely on whether the pre-indictment delay on which MacDonald relies is of constitutional significance.

In *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), the Court held that a three-year delay between the commission of a crime and indictment did not infringe the right to a speedy trial. The defendants in that case, however, were not arrested or formally accused of crime until the return of the indictment. Noting this, the Court carefully avoided adopting a simplistic rule that pre-indictment delay is always immaterial. Instead, referring to the values which the speedy trial provision safeguards, the Court explained that arrest furnishes an alternative starting point for determining the length of delay. It said:

> "[I]t is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.
>
> "Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge. . ." 404 U.S. at 320-21, 92 S.Ct. at 463.

Reiterating these principles in *Dillingham v. United States*, 423 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975), the Court held that even when the defendant has not shown actual prejudice, the time elapsing between arrest and indictment must be considered in appraising the alleged denial of a speedy trial. It is, therefore, essential to determine whether MacDonald's military arrest "engage[d] the par-

ticular protections of the speedy trial provision of the Sixth Amendment." *Marion,* 404 U.S. at 320, 92 S.Ct. at 463.

On May 1, 1970, MacDonald's commanding officer charged under oath that MacDonald, acting with premeditation, murdered his wife and two daughters. Simultaneously, the commanding officer [203] recommended trial by general court-martial.[8] The charge was the functional equivalent of a civilian arrest warrant, for under U.C.M.J. Article 10, 10 U.S.C. § 810, it subjected MacDonald to arrest or confinement.[9] Like its civilian equivalent, military arrest must be based on probable cause.[10] The status of an officer restricted

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8. U.C.M.J. Art. 30, 10 U.S.C. § 830, provides:
"(a) Charges and specifications shall be signed by a person subject to this chapter under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state—
(1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and
(2) that they are true in fact to the best of his knowledge and belief.

"(b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable."

9. U.C.M.J. Art. 10, 10 U.S.C. § 810, provides:
"Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, he shall not ordinarily be placed in confinement. When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him."

10. U.C.M.J. Art. 9, 10 U.S.C. § 809, provides:
"(a) Arrest is the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits. Confinement is the physical restraint of a person.

. . . . . .

"(c) A commissioned officer, a warrant officer, or a civilian subject to this chapter or to trial thereunder may be ordered

to quarters under arrest differs from that of one who is simply restricted to quarters in lieu of arrest. The distinction depends on whether the accused is relieved of his military duties. He is considered to be restricted under arrest if relieved of his duties, and in lieu of arrest if he is not.[11] Because MacDonald was relieved of his duties, he was restricted to quarters under arrest.

As the government's counsel acknowledged at oral argument, had MacDonald been an enlisted man, he probably would have been confined in a stockade. While his restriction to the bachelor officers' quarters was undoubtedly more comfortable and less confining than imprisonment in a guard house, it was nevertheless a public act that seriously interfered with his liberty. He was relieved of his duties, his phone calls were logged by a military policeman, and he was placed under the surveillance of an escort officer whenever he left his quarters.

The government relies on *Wales v. Whitney*, 114 U.S. 564, 5 S.Ct. 1050, 29 L.Ed. 277 (1885), to support its argument that MacDonald's status was not analogous to that of a civilian who has been arrested. In *Wales*, the Medical Director of the Navy, who had been placed under arrest and restricted to the city of Washington, D.C., pending court-martial, sought a writ of habeas corpus to test the jurisdiction of the military court. The Supreme Court, noting that

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into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another commissioned officer. The authority to order such persons into arrest or confinement may not be delegated.

"(d) No person may be ordered into arrest or confinement except for probable cause."

11. *See* ¶ 20 *a* and *b*, Manual for Courts-Martial (U.S. 1969 rev. ed.).

Washington was his place of duty, observed that "[i]t is not easy to see how he is under any restraint of his personal liberty, by the order of arrest, which he was not under before." The Court held that the physical restraint of the Medical Director was insufficient as a matter of fact, and the moral restraint imposed by the order was insufficient as a matter of law, to justify issuance of the writ. In reaching this conclusion, the Court pointed out that other procedures allowed the Medical Director to challenge the military court's jurisdiction, and consequently the denial of his petition did not deprive him of an adequate remedy.

We find the government's attempt to equate MacDonald's situation to Wales' unpersuasive. MacDonald's arrest is distinguished from Wales' by the greater limita- [204] tions placed on his liberty. Apart from this, "[n]otions of custody have changed" since 1885, *Strait v. Laird*, 406 U.S. 341, 351, 92 S.Ct. 1693, 32 L.Ed.2d 141 (1972) (Rehnquist, J., dissenting), and *Wales'* custody requirement for a writ of habeas corpus "may no longer be deemed controlling." *Hensley v. Municipal Court*, 411 U.S. 345, 350 n. 8, 93 S.Ct. 1571, 1574, 36 L.Ed.2d 294 (1973).

In any event, the standard employed by the Court in *Wales* to evaluate a restraint of liberty for the procedural requirements of habeas corpus provides an unsatisfactory measure to test the denial of the sixth amendment's guarantee to a speedy trial. The appropriate test is found in *Marion*, not *Wales*. MacDonald was subjected to "actual restraints imposed by arrest and holding to answer a criminal charge." *Marion*, 404 U.S. at 320, 92 S.Ct. at 463.[12]

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12. The Assistant United States Attorney for the Eastern District of North Carolina, appearing for the government in the bail hearing before a magistrate for the United States District Court for the Central District of California, described MacDonald's status as follows:

It is these circumstances, as the Court points out, "that engage the particular protections of the speedy trial provision of the Sixth Amendment." *Marion*, 404 U.S. at 320, 92 S.Ct. at 463. We conclude, therefore, that MacDonald's military arrest was the functional equivalent of a civilian arrest allowing him to invoke the sixth amendment's guarantee of a speedy trial.

For the purpose of determining whether the sixth amendment applies, it is immaterial that, although the Army initially accused and arrested MacDonald, the civilian arm of the government is currently prosecuting him.[13] The prosecution of the same charge—murder—that the Army began was pursued by the Department of Justice. The sixth amendment, we hold, secures an accused's rights to a speedy trial against oppressive conduct by the government in its single sovereign capacity, regardless of the number and character of the executive departments that participate in the prosecution.

MacDonald's freedom from detention or bail during the interval between the termination of the Article 32 proceedings and his arrest after indictment did not, from a practical standpoint, dispel the effects of the government's initial accusation. MacDonald, of course, realized that the favorable conclusion of the Article 32 proceedings was not the

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"Back in the Article 32 hearing, he was in custody. He did have an officer with him, assigned to him, as Mr. Segal explained to you. He was, more or less, I believe they call it house arrest at the BOQ. And then, of course, once he was released on the charges, he was no longer required to have another Army officer with him. Shortly after that, he was discharged from the Service."

13. We agree with the government that Fed.R.Crim.P. 48(b) did not control the military proceedings against MacDonald and thus was not applicable to him until his arrest by civilian authorities, *cf. Boeckenhaupt v. United States*, 392 F.2d 24 (4th Cir. 1968).

end of the government's efforts to convict him. Prudence obliged him to retain attorneys at his own expense for his continuing defense.[14] He remained under suspicion and was subjected to the anxiety of the threat of another prosecution.

The absence of imprisonment or bail does not always render inoperative the constitutional guarantee of a speedy trial.[15] [205] In *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967), the Court held that the practice of nolle prossing an indictment with leave to reinstate it deprived an accused of his right to a speedy trial even though he was not confined or required to post bail. *Klopfer* differs from this case in one respect: there, an indictment remained potentially effective during the period of delay; here, MacDonald was not indicted until the end of the period. Apart from the absence of an indictment, MacDonald's situation bears a marked resemblance

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14. MacDonald alleges that his legal expenses for contesting the Army proceedings against him and for retaining counsel since then amount to $50,000. He estimates that expenses of trial would amount to an additional $250,000.

15. Although the government acknowledges that the Speedy Trial Act of 1974 does not govern this case, it contends that the principles codified in 18 U.S.C. § 3161(h)(6) and its prototype, ABA, *Standards Relating to Speedy Trial* § 2.3(f) (App. draft 1968), should be applied to toll the running of time during the interval from the dismissal of the Army's charges against MacDonald in October 1970 to the return of the indictment in 1975. However, the tolling provision of § 3161(h)(6) must be read in conjunction with the entire Act, which sets fixed time limits after arrest, subject to certain exclusions, within which trial must take place. A single section of the Act should not be used outside of its statutory context as a standard for interpreting the sixth amendment, because the Act does not purport to mark the bounds of the sixth amendment's speedy trial clause. In contrast, *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), which eschews rigid time limits, provides the analysis which we must follow in determining whether the sixth amendment's guarantee has been violated.

to Klopfer's. After formal arrest and charge, both men contested their accusations with the inconclusive result of Klopfer's mistrial and the dismissal of the charges against MacDonald after the Article 32 proceedings. The prosecution against both men, however, could have gone forward promptly—Klopfer's by retrial and MacDonald's by court-martial if the commanding general had rejected Colonel Rock's Article 32 report or if the United States Attorney had presented the case to a grand jury.[16] Nevertheless, neither man was held for trial. Consequently, Klopfer and MacDonald were free from imprisonment or the restraints of bail, but at all times they were subject to prosecution. Unlike defendants held pending trial, Klopfer and MacDonald were deprived of any forum in which to vindicate themselves. Most importantly, under the theory advanced by the state in *Klopfer* and by the federal government here, neither man would be safeguarded by the sixth amendment until the government, at its leisure, renewed the prosecution.

Speaking of the purposes of the sixth amendment's speedy trial provision, the Court said in *United States v. Marion*, 404 U.S. 307, 320, 92 S.Ct. 455, 463 (1971):

> "Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associa-

16. U.C.M.J. Arts. 18, 32-34, 10 U.S.C. §§ 818, 832-34; ¶¶ 34 and 35 Manual for Courts-Martial (U.S. 1969 rev. ed.); 18 U.S.C. §§ 1111 and 3231.

> tions, subject him to public obloquy, and create anxiety in him, his family and his friends. These considerations were substantial underpinnings for the decision in *Klopfer v. North Carolina* . . . ."

The considerations which the Court recognized as "substantial underpinnings" for affording Klopfer the protection of the sixth amendment apply also, we believe, to MacDonald, whose situation, viewed realistically, was similar to Klopfer's.

The delay between the accusation and detention of MacDonald and his indictment was more than four and one-half years. The Court described a five-year delay as "extraordinary" in *Barker*, 407 U.S. at 533, 92 S.Ct. 2182, and in *United States v. Macino*, 486 F.2d 750 (7th Cir. 1973), a 28-month delay between arrest and indictment was considered excessive. We conclude, therefore, that the delay in MacDonald's case is sufficiently long to justify "inquiry into the other factors that go into the balance" of assessing MacDonald's claim that he has been denied a speedy trial. *Barker*, 407 U.S. at 530, 92 S.Ct. 2182.

*The reason for the delay.* *Barker* teaches that the weight to be given delay varies with the government's reasons. Deliberate delay to hamper the defense must be weighed heavily against the government, and valid reasons such as a missing witness serve to excuse the delay. Neither of these [206] extremes applies to MacDonald's case, which appears to fall in a middle ground. Speaking of this, the Court said that a "neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." 407 U.S. at 531, 92 S.Ct. at 2192.

There are several identifiable phases of delay and the reasons for them differ. During the initial period, the 1970 Army investigation and Article 32 proceeding, MacDonald was being prosecuted, so the inaction of civilian authorities was justified. For the next 18 months, at the request of the Department of Justice, the CID conducted another extensive investigation. Since the charges had been previously dismissed for insufficient evidence, the civilian prosecutors understandably desired a new investigation before bringing MacDonald to trial. The investigators were not dilatory and the case is complex, so this delay should not be weighed heavily against the government. *See Barker*, 407 U.S. at 531, 92 S.Ct. 2182.

The CID's report, along with its recommendation to prosecute, was transmitted to the Department of Justice in June 1972, more than two years before the commencement of grand jury proceedings. The government has not provided any satisfactory explanation for this two-year hiatus. It suggests that the need for further investigation and for its attorneys to become familiar with the case justifies the delay. But no significant new investigation was undertaken during this period, and none was pursued from August 1973 until the grand jury was convened a year later. Moreover, the United States Attorney was familiar enough with the case to recommend prosecution and specify his need for an additional attorney in the summer or fall of 1973. There is no indication in the record that the delay during this period was "inevitable" because of "[c]rowded dockets, the lack of judges or lawyers," or any other factor which might mitigate the government's failure to bring MacDonald to trial promptly after the CID completed its report in June 1972. *See Dickey v. Florida*, 398 U.S. 30, 38, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970). The leisurely pace from June 1972

until the indictment was returned in January 1975 appears to have been primarily for the government's convenience.[17] The Assistant United States Attorney for the Eastern District of North Carolina, who is familiar with the case, expressed an even harsher assessment of the delay. He told the magistrate at the bail hearing that the tangible evidence had been known to the government since the initial investigation in 1970 but that it had not been fully analyzed by the F.B.I. until the latter part of 1974. He explained that the F.B.I. analysis was tardy "because of government bureaucracy."[18] Whether one attributes the delay [207]

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17. The government may have proceeded on the erroneous assumption that no matter how much time elapsed between prosecutions, the pre-indictment delay would be of no consequence. But a mistake of law affords no justification for depriving an accused of sixth amendment rights. *Dickey v. Florida*, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970).

18. During the course of the government's summation at the bail hearing, the Assistant United States Attorney and the Magistrate engaged in the following colloquy:

ASSISTANT UNITED STATES ATTORNEY: Your Honor, there is, I am sure, some question about the five-year period of time in here. This case has been investigated over a five-year period of time. It was not until very recently that the FBI Laboratory came into the case. Previously, the investigation of the case from a scientific viewpoint was by the Army CID Lab.

At the time of the Article 32 hearing in 1970 when Dr. MacDonald was released from the Army charges, much of the scientific evidence that I've made available to you today was not available to the hearing officer at that time.

THE MAGISTRATE: But this evidence has been gone over—this evidence is four or five years old now . . .

ASSISTANT UNITED STATES ATTORNEY: Yes. The evidence with regard to the pajama top, the bath mat and the sheet: All that evidence has been produced within the last five months by the FBI Lab.

THE MAGISTRATE: But that evidence—the analysis of that evidence was within the last five months, is that correct?

ASSISTANT UNITED STATES ATTORNEY: Yes, sir. The evidence was in existence the whole time: The bloody sheet, the bath mat and the—

THE MAGISTRATE: The time—three to four years passed between the creation of the evidence and its analysis?

from mid-1972, when the CID recommended prosecution, until the indictment was returned in January 1975 to indifference, negligence, or ineptitude, it must be weighed against the government. *Barker*, 407 U.S. at 514, 92 S.Ct. 2182; *Dickey v. Florida*, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed. 2d 26 (1970). We turn, therefore, to the third factor prescribed by *Barker*, an appraisal of MacDonald's conduct.

*The defendant's assertion of his right.* In *Barker* the Supreme Court observed that some defendants may wish to delay trial in expectation of the prosecution's case becoming stale. 407 U.S. at 521, 92 S.Ct. 2182. At the same time, it rejected a strict "demand-waiver" approach that requires a defendant to assert the right or lose it. 407 U.S. at 524-29, 92 S.Ct. 2182. It recognized, however, that an important factor in deciding a claim that a defendant has been denied a speedy trial is whether he wanted one and made his demands known to the prosecution. 407 U.S. at 531-32, 92 S.Ct. 2182.

MacDonald has by no means delayed the prosecution of his case. While he was in the Army, and afterwards, he gave statements to the CID. He testified under cross-examination in the Article 32 hearing and offered to submit himself to questioning by attorneys in the Department of Justice. Additionally, he waived immunity and testified before the grand jury.

MacDonald also has consistently expressed a desire to have the case resolved. He first attempted to expedite a

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ASSISTANT UNITED STATES ATTORNEY: That's correct.
THE MAGISTRATE: Very well.
ASSISTANT UNITED STATES ATTORNEY: We were not —Because the FBI Lab, because of Government bureaucracy, did not come into the case, and we were unable to get them into the case until the beginning of this Grand Jury.
Prior to that time, the Army CID Lab out of Fort Gordon handled it, and they do not have the sophistication that the FBI Lab has, and they will admit that.

decision in January 1972. Later, his attorneys wrote the department several letters inquiring about a final decision on the prosecution to relieve "the unfounded suspicion" to which MacDonald was subjected.[19] A person in his position who has been arrested but not indicted is under no compulsion to demand prosecution in order to preserve his right to a speedy trial, for the primary responsibility for bringing cases to trial rests on the government. *United States v. Macino*, 486 F.2d 750 (7th Cir. 1973); *cf. Barker*, 407 U.S. at 529, 92 S.Ct. 2182. Both the facts and the law, therefore, warrant the conclusion that MacDonald reasonably asserted his right to a speedy trial. In accordance with *Barker*, his assertion "is entitled to strong evidentiary weight in determining whether [he] is being deprived of the right." 407 U.S. at 531-32, 92 S.Ct. 2182, 2192.

*Prejudice to the defendant.* An affirmative demonstration of prejudice is unnecessary to prove a denial of the right to a speedy trial. It is, however, one of the factors a court must weigh in adjudicating the accused's claim. *Moore v. Arizona*, 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973); *Barker*, 407 U.S. at 533, 92 S.Ct. 2182. The Court has said the sixth amendment's guarantee of a speedy trial is "an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States v. Ewell*, 383 U.S. 116, 120, 86 S.Ct. 773, 776, 15 L.Ed.2d 627 (1966). Prejudice, therefore, should be assessed in the light of these interests. *Barker*, 407 U.S. at 532, 92 S.Ct. 2182.

MacDonald was not imprisoned or subject to bail from October 1970 until January 1975, but his freedom to come

19. Extracts from some of the letters are quoted in notes 5 and 6 *supra*.

and go is not decisive. An accused person who [208] is not restrained may nonetheless be prejudiced. *Klopfer v. North Carolina,* 386 U.S. 213, 221, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967). MacDonald has had to live with the constant threat of a new prosecution. He has been required to retain counsel at his own expense, and he has suffered anxiety concerning the unresolved nature of the case. These personal concerns are significant elements of prejudice. *United States v. Marion,* 404 U.S. 307, 320, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

Also, MacDonald's claim that his ability to defend himself has been impaired is not unfounded. Most of his witnesses who were in the Army in 1970 have scattered across the country. Even if the government provides the defense with current addresses, interviewing these witnesses before trial and insuring their presence at trial would be time-consuming and expensive. Moreover, in the five years since the murders, memories have faded and witnesses can no longer be expected to reliably recall details.

Such potential memory loss is critical in this case, since a detailed reconstruction of the murder scene is an element of the government's case. The position of a flowerpot, the way MacDonald's pajama top was folded, the condition of the sheets in the bedroom, are but examples of the many questions about physical evidence that the government's case turns on. In one instance, the government contended at the Article 32 hearing that an overturned coffee table lying on its side showed that the murder scene was staged, since the table was top-heavy and would have turned completely over if kicked in a scuffle. When the Article 32 officer visited the scene and kicked the table over, however, it struck a chair and landed on its side. Thus, the exact position of the chair is important in determining whether MacDonald staged the murders as the government charges.

The prosecution emphasizes that all of the testimony at the Article 32 hearing and the statements made to investigators since then have been kept and may be used to refresh memories. Yet this in itself illustrates the prejudice to MacDonald. A stale witness, forced to rely on statements made half a decade previously, cannot be as effective as one actually remembering what he saw. Since the details of any witness's testimony may change over five years, the adverse inference a jury might draw from the government's use of its old records to impeach defense witnesses cannot be overlooked.

In sum, applying the principles of *United States v. Marion*, 404 U.S. 307, 320-21, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), we conclude that for the purposes of determining whether MacDonald was denied his right to a speedy trial, the Army's formal accusation and detention on May 1, 1970, entitled him to invoke the protection of the sixth amendment. *See Dillingham v. United States*, 423 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975). Weighing the factors specified by *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), we believe that the delay—even if the period from May 1, 1970, to June 30, 1972, is wholly excluded as excusable—was of sufficient length to be "presumptively prejudicial." 407 U.S. at 530, 92 S.Ct. 2182. The delay, therefore, necessitates inquiry into the other factors of the balance. The government has furnished no satisfactory explanation for the delay from the end of June 1972 until the grand jury was convened in August 1974, so this time must be weighed against it. MacDonald, on the other hand, neither contributed to this delay nor acquiesced in it, so his conduct weighs heavily in his favor. Finally, it is apparent from the record that MacDonald has been prejudiced by the formal accusation and arrest of May 1970, by anxiety arising out

of the delayed resolution of this charge, and by the impediment to his defense that scattered witnesses and dimmed memories inevitably cause. Weighing all of these factors, we conclude that the government has denied MacDonald a speedy trial as guaranteed by the sixth amendment and that the prosecution must be dismissed. *Strunk v. United States,* 412 U.S. 434, 93 S.Ct. 2260, 37 L.Ed.2d 56 (1973).

[209] IV

We find no error in the district court's rulings concerning the composition of the grand jury, alleged prosecutorial misconduct, and the denial of motions for discovery and suppression of evidence.

MacDonald claims that General Flanagan's acceptance of his exoneration in the Article 32 hearing collaterally estops the government from prosecuting him again. Alternatively, he argues that the second prosecution places him in double jeopardy. The government argues, however, that the Article 32 proceedings did not place MacDonald in jeopardy since only a court-martial, which was never convened, could have convicted him. Decision of this aspect of the case depends largely on the legal effect of the acceptance of an Article 32 recommendation by the commanding officer. It appears that custom imputes finality to the commanding officer's decision. This would arguably sustain a plea of collateral estoppel, if not double jeopardy, but no military regulation or case specifically deals with this question. In view of the unsettled state of this point of military law and of our disposition of the case under the speedy trial provision of the sixth amendment, we find it unnecessary and imprudent to render an opinion, which would in effect be advisory, on an issue of general importance to military law.

The case is remanded with directions to dismiss the prosecution with prejudice because of the government's failure

to accord MacDonald a speedy trial as required by the sixth amendment.

CRAVEN, Circuit Judge (dissenting):

My brothers hold that the sixth amendment compels the dismissal of the *only* prosecution ever begun against Dr. MacDonald. One need know very little about military law to understand that a charge of homicide can be disposed of finally only by court-martial. None was ever convened. Instead, the Army, pursuant to Article 32, Uniform Code of Military Justice,[1] simply conducted a "thorough and impartial investigation" to determine whether the charge might be referred to a general court-martial, and concluded that the evidence was insufficient to justify the convening of a general court. It is true that the hearing was protracted and made newspaper headlines. But it is also true, it seems to me (my brothers do not reach the question), that Captain MacDonald has never been put to trial by either a civil or military court. What happened to him in the Army is the substantial equivalent of an open grand jury proceeding resulting in the failure to return a true bill, and that is all.[2]

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1. 10 U.S.C. § 832.

2. My brothers premise their analysis on an application of a civilian court of the sixth amendment speedy trial guarantee to events which occurred while MacDonald was in the military.

That the sixth amendment's speedy trial guarantee applies to the military is an appealing assumption but should be recognized as such. The criminal trial provisions of both the fifth and sixth amendments are clearly aimed at procedure in the civil courts. The fifth expressly excludes cases arising in the land or naval forces from prosecutions requiring grand jury indictment, and it is settled that neither the fifth nor sixth amendments can "be taken to have extended the right to demand a jury to trials by military commission . . . ." *Ex Parte Quirin*, 317 U.S. 1, 40, 63 S.Ct. 1, 17, 87 L.Ed. 3 (1942). It is true that the Supreme Court once assumed the application of the double jeopardy clause of the fifth amendment in a military context, but in doing so it is significant that it denied relief. *Wade v. Hunter*, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974

My brothers hold that the sixth amendment's guarantee of the right to a speedy trial as interpreted by the Supreme Court [210] in *Marion*,[3] *Barker*,[4] and *Dillingham*,[5] is triggered by the Army proceedings. I think not and respectfully dissent.

I.

In *Marion* the Supreme Court defined the point at which the sixth amendment becomes applicable:

> On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been *"accused"* in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time.

404 U.S. at 313, 92 S.Ct. at 459 (emphasis added).

It is now settled that a civilian becomes an "accused" when he is arrested and charged with a crime. This is so, the Supreme Court tells us, because:

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(1949). I think my brothers' decision would rest on firmer ground if it were pitched on the fundamental fairness doctrine implicit in the due process clause, which has been applied time and again to an infinite variety of matters not restricted to criminal procedure in the civilian courts, as is, I think, the sixth amendment right to speedy trial. *See generally, O'Callahan v. Parker*, 395 U.S. 258, 272-73, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969); *Kinsella v. Krueger*, 351 U.S. 470, 474, 76 S.Ct. 886, 100 L.Ed. 1342 (1956); *Duncan v. Kahanamoka*, 327 U.S. 304, 309, 66 S.Ct. 606, 90 L.Ed. 688 (1946); *Burns v. Lovett*, 91 U.S. App.D.C. 208, 202 F.2d 335, 341-42 (1952), *aff'd sub nom., Burns v. Wilson*, 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953).

3. *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

4. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

5. *Dillingham v. United States*, 403 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205, 44 U.S.L.W. 3327 (U.S., Dec. 1, 1975).

> To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.

*Marion, supra* at 320, 92 S.Ct. at 463. *See Dillingham v. United States*, 403 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975) (quoting *Marion*).

Thus, "it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." *Dillingham, supra; Marion, supra.*

It is significant to me that the Court equates "either a formal indictment . . . or else the actual restraints imposed by arrest . . . to answer a criminal charge . . . ." It does *not* suggest that the amendment is triggered when the prosecutor presents the bill to the grand jury. Instead, the period of time for measuring the speed of the trial runs from the return of a true bill into the court. Charge is not enough. At most, Dr. MacDonald was "charged." Also, under the specific language of *Marion*, I do not believe the sixth amendment's speedy trial guarantee would be brought into play by an arrest without warrant by a federal drug enforcement officer, for example, if, upon presentation to a magistrate, the arrestee were released because no probable cause was shown. I do not believe my brothers would contend otherwise.[6]

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6. I note that Dillingham was arrested on a warrant. *United States v. Palmer*, 502 F.2d 1233, 1234 (5th Cir. 1974), *rev'd sub nom. Dillingham v. United States*, 403 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205, 44 U.S.L.W. 3327 (1975).

My analysis of the facts of this case is that the procedure in which MacDonald was involved falls somewhere between an unsuccessful presentation to a grand jury and an arrest and subsequent release because of a failure to demonstrate probable cause for the arrest. Neither, I believe, warrants an application of the sixth amendment's speedy trial guarantee.[7]

MacDonald was charged with the murder of his wife and children by Colonel Francis Kane, his immediate commander. These charges were preferred under Article 30 [211] U.C.M.J.[8] That article makes clear that a finding of "probable cause" is not required to "charge" an individual under the Code.[9] Indeed, anyone subject to the U.C.M.J. can prefer charges against anyone else who is also under the Code.[10] A determination of probable cause, or its "functional equivalent," is only made under military procedure at the Article 32 proceedings.[11]

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7. This case differs from both my examples in that during these proceedings MacDonald was neither as free from restraints as a person under grand jury investigation nor as restricted as someone under civilian arrest. *See* part II, *infra*.

8. 10 U.S.C. § 830.

9. Article 30 reads as follows:

(a) Charges and specifications shall be signed by a person subject to this chapter under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state—

(1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and

(2) that they are true in fact to the best of his knowledge and belief.

(b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable.

10. ¶ 29b, Manual for Courts-Martial (U.S. 1969 rev. ed.).

11. Article 32, 10 U.S.C. § 832 reads in relevant part:

(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investi-

In MacDonald's case, at the close of the Article 32 proceedings Major General Edward M. Flanagan, Jr., acting on the report of Colonel Warren V. Rock, who presided at those proceedings, dismissed the charges because "[i]n [his] opinion, there [was] insufficient evidence available to justify reference of the charges to trial by court-martial."

It is therefore clear that no finding of probable cause was made in Dr. MacDonald's case at the Article 32 proceedings. My brothers are of the view, however, that we should presume such a finding was made because it should have been made prior to "arrest" under 10 U.S.C. § 810.

Whether a finding of probable cause was made is a question of fact. If there were such a finding I should think it would be supported by the record, but the majority makes no reference to any orders, either written or oral, to indicate that a finding of probable cause was made. We are not told when the finding was made, who made it, or what procedures he followed in doing so. Instead, as I have said, a presumption is created.

First, my brothers reason that since MacDonald was relieved of his duties, his status must be that of "arrest" rather than "restriction to quarters in lieu of arrest." Secondly, they correctly note that under 10 U.S.C. § 810 MacDonald was subject to arrest or confinement when charged with the murders by Colonel Kane on May 1. And finally, they infer that since 10 U.S.C. § 809 purports to require that

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gation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

all arrests be supported by probable cause that probable cause must have been found in MacDonald's case.

I do not believe it is necessarily the case that because MacDonald was relieved of his duties, he was arrested. I read Paragraphs 20a and b of the Manual for Courts-Martial only to say that an officer under "arrest" may not be required to perform his duties and that an officer restricted to quarters in lieu of arrest may be required to do so. These two provisions do not forbid the Army from relieving one restricted to his quarters of any or all of his duties. That MacDonald was relieved of all duties is not, I believe, conclusive as to this status.

I agree with my brothers, as I have previously said, that MacDonald was subject to arrest or confinement under 10 U.S.C. § 810 when charged with homicide. But I cannot agree that the power to do a thing requires a finding that it was done. Whatever the logic of such a presumption, I believe Paragraph 18b of the Manual of Courts-Martial destroys it for that paragraph explicitly states that the arrest and confinement pro- [212] visions, although couched in terms of requirements, are "not mandatory and [their] exercise rests within the discretion of the person vested with the power to arrest or confine."[12]

I think the Manual of Courts-Martial will take us just so far and that we are driven back to the facts, and the facts are that Dr. MacDonald was verbally restricted to quarters

12. b. Basic consideration. (1) Any person subject to the code accused of an offense under the code shall be ordered into arrest or confinement, as circumstances may require; but when accused only of an offense normally tried by a summary court-martial, he shall not ordinarily be placed in confinement (Art. 10). The foregoing provision is not mandatory and its exercise rests within the discretion of the person vested with the power to arrest or confine. No restraint need be imposed in cases involving minor offenses. A failure to restrain does not affect the jurisdiction of the court.

by Colonel Kane on April 6, 1970, and there is nothing whatsoever in the record to suggest any change in his status when he was formally charged on May 1. If MacDonald was ever arrested it must have been on April 6 when he was first restricted to quarters and his duties lifted, and on that date I do not believe that anyone suggests the existence of probable cause for arrest, let alone a specific finding to that effect.[13]

My brothers and I agree, I think, that arrest without more is not enough to trigger the sixth amendment. There must be a lawful arrest, *i.e.*, with probable cause. It is fair to say, I think, that there is not one word in the record to even suggest that anyone, much less the equivalent of an impartial magistrate, ever purported to find probable cause to arrest Dr. MacDonald. I believe we can be fairly sure that this is the first instance in the long history of the doctrine of probable cause in which a court has assumed that there must have been such a finding because it should have been made.

Finally, I cannot agree with my brothers that Colonel Kane's charge was the functional equivalent of a civilian arrest warrant. I am not sure to what it should be equated, but it is equally plausible to view it as the functional equivalent of the complaint of the prosecutor who then must seek an arrest warrant from an impartial magistrate.

Based on the above analysis I believe it is clear that a finding of probable cause was *never* made in Dr. MacDonald's case. Unless we ignore as surplusage the Supreme Court's language in *Marion*, which it repeated in *Dillingham*, that to "arrest and detain, the Government must assert prob-

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13. All the majority tells us about that event is that on April 6 the CID informed MacDonald that "he was under suspicion." At 200. I find nothing in their treatment of this encounter nor anything in the record to indicate that on that day probable cause was found.

able cause to believe the arrestee has committed a crime," I do not understand how this case can be fitted within the rule of law established by those cases. Furthermore, I do not believe that the policy underpinnings of *Marion* allow us to ignore the significance of a finding of probable cause. The Supreme Court concentrated on the impact of the public act of arrest on the defendant. I believe that fundamental to that impact is the fact that, in the civilian arrest context with which *Marion* was concerned, an arrest must be supported by probable cause. With reference to public obloquy, contrast instead, what happened to Dr. MacDonald: after the equivalent of the return of "not a true bill," he was honorably discharged. I, therefore, think that Dr. MacDonald's case is clearly distinguishable from any of the cases cited by the majority.

My brothers find this case to closely parallel *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967), differing from it in only one respect: "there an indictment remained potentially effective during the period of delay; here, MacDonald was not indicted until the end of the period."[14] I agree that that is the major difference between the cases, but I find the distinction to constitute the centerpiece of the Supreme Court's holding in that case [213] that Klopfer's sixth amendment rights had been violated.

> The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging this oppression, as well as the "*anxiety and concern accompanying public accusation*," the criminal procedure condoned in this case by

14. At 205.

> the Supreme Court of North Carolina clearly denied the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States.

386 U.S. at 222, 87 S.Ct. at 993 (footnote omitted and emphasis added).

During this four-year period MacDonald stood under no "public accusation." The charges had been dismissed by the Army, and this action was made irrevocable by his discharge from the Army. I find this claim therefore to be one of double jeopardy, which I do not believe is meritorious, and which issue my brothers do not reach.

II.

Under my brothers' reasoning, we must determine that military arrest is the functional equivalent of civilian arrest for the purposes of triggering the right to a speedy trial. I conclude that MacDonald was never "arrested" in the sense required under *Marion*.

MacDonald was restricted to his room in the Bachelor Officers' Quarters.[15] An armed MP was placed outside his door. An escort officer accompanied him when he left the quarters.[16] While *Wales v. Whitney*, 114 U.S. 564, 5 S.Ct.

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15. The majority opinion attaches significance to the fact that had MacDonald been an enlisted man he would have probably been confined in the stockade. At 203. The fact is that he was an officer and was not so confined.

16. The government describes MacDonald's restrictions as follows:

> He was to remain in his room except when he was visiting his lawyers, dining at the officers club, or making parachute jumps for pay qualification purposes. The general, though unenforced, limitation on Captain MacDonald's movement was the requirement that he be accompanied by an escort

1050, 29 L.Ed. 277 (1885) is, as my brothers say, no longer the law as to the degree of "confinement" necessary to support issuance of a writ of habeas corpus, I believe it is fully applicable to the majority's search for the functional equivalent of a civilian arrest. In that respect, I believe it is still sound precedent and demands a conclusion that MacDonald was not in a civilian sense under the "actual restraints required by arrest and holding to answer to a criminal charge."

In *Wales* a Navy officer who had been ordered to appear for trial at general court-martial was given the following order by the Secretary of the Navy: "You are hereby placed under arrest, and you will confine yourself to the limits of the City of Washington." 114 U.S. at 566, 5 S.Ct. at 1051. While the majority may be correct that the cases differ with respect to "the greater limitations placed on [MacDonald's] liberty,"[17] I believe, like those in *Wales*, the restraints imposed on MacDonald did not constitute "actual confinement or the present means of enforcing it." 114 U.S. at 572, 5 S.Ct. at 1053. The restraints were, under the Supreme Court's terminology, simply "moral." As I read *Wales*, the critical point was not that the petitioner in that case was free to walk the streets of Washington, D. C., alone. The Supreme Court focused on the fact that if he had

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officer while on post. He was permitted to sun bathe in the vicinity of the BOQ, to play golf on post, to attend the post chapel as well as the post theatre, post liquor (Class V!) store, commissary, post exchange and the bowling alley.

Brief for Appellee at 5-6.

In the context of the military where a person is subject normally to the orders of his superiors, I do not find this the type of serious "interfere[nce] with his liberty" which I believe brings the right to speedy trial into play.

17. At 203-204.

wished to leave the District, he was free to do so, "[a]nd though it is said that a file of marines or some proper officer could have been sent to arrest, and bring him back, this [214] could only be done by another order of the secretary, and would be another arrest, and a real imprisonment under another distinct order." 114 U.S. at 572, 5 S.Ct. at 1054.

Neither side has provided this court with the orders directed to MacDonald or others concerning his restriction to quarters. At oral argument, however, we were told by the government attorney arguing the case that the MP stationed outside MacDonald's door was given specific instructions *NOT* to stop him if he tried to leave. The escort officer who accompanied MacDonald, according to my understanding of the facts, was not armed. I find nothing in the record to indicate that his orders included a direction to stop MacDonald from any conduct he undertook. I therefore find the present case indistinguishable from *Wales*. Any actual confinement would have required an additional order, and there was therefore no "actual confinement or the present means of enforcing it." *Wales, supra* at 572, 5 S.Ct. at 1053.

III.

Having concluded that the sixth amendment's guarantee of speedy trial does not apply in MacDonald's case, he may still prevail if it were found that the delay violated his right to due process under the fifth amendment. *See, e. g., Marion, supra*, 404 U.S. at 324, 92 S.Ct. 455; *Ross v. United States*, 121 U.S.App.D.C. 233, 349 F.2d 210 (1965). But to grant relief under the fifth amendment requires a showing of substantial prejudice, and I find none. *Id.*

The majority finds prejudice in the fact that MacDonald's witnesses, as Army personnel, have scattered around the world with resulting difficulty in locating them and con-

ducting pretrial interviews. In addition, my brothers agree with MacDonald's argument that the memories of these witnesses will be dulled by time. But all that is speculative. In a wholly circumstantial type of case, it is improbable that guilt or innocence will turn upon accurate recollection of the facts. It is not suggested that any defense witness who knows the truth now cannot be produced, or if found, cannot now remember what he once knew.

But if it be assumed that these factors may supply the requisite prejudice under the sixth amendment's more specific guarantees, I do not believe they require dismissal of the indictment under the fifth amendment's guarantee of due process. Certainly that question need not be anticipated, and could best be left for determination at trial.

I would affirm.

## Appendix "B"

### CHRONOLOGY OF EVENTS

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| February 17, 1970 | The assaults on the MacDonald family. |
| April 6, 1970 | MacDonald is advised he is a suspect and is restricted to quarters. |
| April, 1970 | Justice Department begins monitoring the prosecution. |
| May 1, 1970 | MacDonald is formally charged with the murders of his family and is placed under armed guard. |
| May 12, 1970 | Investigating Officer is appointed, pursuant to UCMJ Article 32, to determine whether the charges should be referred to trial. |
| July 6, 1970 | Article 32 proceedings begin. Government prosecutors state that they are ready to proceed with the case against MacDonald. |
| October 13, 1970 | Investigating Officer submits his report containing two ultimate findings: the charges against MacDonald are "not true," and there is evidence warranting an investigation of Helena Stoeckley for complicity in the crime. |
| October 23, 1970 | The military charges are dismissed. |
| December 5, 1970 | MacDonald is honorably discharged from the Army. |

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| January, 1971 | Justice Department asks the Army CID to conduct a reinvestigation of the case. |
| December, 1971 | CID reinvestigation is completed. |
| January, 1972 | MacDonald requests the Justice Department to complete its review of the case. These requests are renewed a number of times between this date and January, 1974. |
| June, 1974 | Justice Department attorney is assigned to prepare the case for submission to a grand jury. |
| August, 1974 | Grand jury testimony begins. MacDonald is the first witness and testifies for four days. |
| January 24, 1975 | Grand jury returns indictment against MacDonald. |

## Appendix "C"

*The following story was transmitted by the Associated Press on January 9, 1981. It is based on a copyrighted story in the Fayetteville Times.*

Fayetteville (AP) A woman who claims to have witnessed the slayings of former Green Beret physician, Jeffrey R. MacDonald's wife and two children in 1970 said MacDonald was a victim, not the murderer.

In a copyrighted story published today, The Fayetteville Times quoted Helena Stoeckley as saying MacDonald's family was killed by members of a witchcraft cult bent on revenge because MacDonald had "been giving drug users a hard time. . . ."

MacDonald, who now lives in Huntington Beach, Calif., was convicted in federal court in Raleigh in August 1979 of one count of first degree murder and two counts of second degree murder in the beating and stabbing deaths of his wife, Colette, 26, and their daughters, Kimberly, 5, and Kristen, 2, at their Army base home at Fort Bragg.

The 4th U.S. Circuit Court of Appeals overturned that conviction in 1980, ruling his right to a speedy trial had been violated. The government has until Feb. 17 to appeal that decision.

MacDonald, who required medical attention for stab wounds in the chest as a result of the 1970 incident, has maintained that his wife and daughters were killed by three men accompanied by a woman dressed in a floppy hat with long blonde hair, wearing boots and carrying a lighted candle. The prosecution has contended that MacDonald's wounds were self-inflicted.

Ms. Stoeckley told the newspaper she was the woman in the floppy hat. The newspaper also said she named the others allegedly involved in the deaths.

In the past government spokesmen have contended that remarks made by Ms. Stoeckley tending to involve her in the murders were allusions [sic] she manufactured because her attire matched the description given by MacDonald.

She was called as a witness at MacDonald's trial, but testified she could not recall being at the MacDonald home. U.S. District Judge Franklin T. Dupree Jr., the judge at MacDonald's trial, subsequently referred to her as "a person whose mind is far impaired" who "remains in a constant state of hallucinations."

The Times quoted Ms. Stoeckley as saying she did not tell her story in court because she was frightened.

Ms. Stoeckley said she was talking now because "I was tired of living with this thing. I was in a private hell. I'd like to see this resolved in the right manner. It seems like, until now, no one has the blame for botching things up."

In the interview with The Times, Ms. Stoeckley described the scene at the MacDonald home as "horrifying ... bloody ... out of control."

"Everytime I would re-enter a room, somebody was struggling with somebody." she said.

She said a scream that MacDonald attributed to his wife was her own, because of the violence developing in the house.

"I went into another room and saw another child in there. She looked like she was sleeping. But it was all dimly lit, you couldn't see anything," she said.

"That's when I backed into something behind me. It was the (toy riding) horse ... one of the springs was loose.

"I went out of there ... the blood ... that's when I realized things were out of control. That's when I screamed ...," she said.

She said she remembered going into the back yard to wait for the others but does not remember whether she went back into the house. She said she did remember getting into a car and leaving the house.

Ted Gunderson, a Los Angeles private detective hired by some of MacDonald's friends, said he has found a witness who saw the car pulling away in the manner described by Ms. Stoeckley.

Gunderson also said Ms. Stoeckley has taken a polygraph test indicating her account of the murders was true.

The Times reported it also had learned that the government gave Ms. Stoeckley a polygraph test in April 1971 that indicated she lied when she told an investigator that she had not been in the MacDonald home.

Ms. Stoeckley told the newspaper she had offered to confess to an Army investigator, Robert Brisentine, before he gave her the polygraph test in Nashville, Tenn. She said he offered no encouragement to her request for immunity, and she "got scared" and changed the story.

"One of the drugs I used on the night of the murders was LSD," she said.